Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

JOHN J. TIGUE, JR. and
MORVILLO, ABRAMOWITZ, GRAND,
IASON & SILBERBERG, P.C.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF JUSTICE
and INTERNAL REVENUE SERVICE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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65 pp

QUESTION PRESENTED

Whether the United States Government may refuse (pursuant to Title 5 U.S.C. § 552(b)(5), an exception to the Freedom of Information Act's disclosure requirements which pertains only to inter-agency and intra-agency communications) to disclose a memorandum which was sent from a Government agency to a non-governmental entity.

SUPREME COURT RULE 29.6
CORPORATE DISCLOSURE STATEMENT

Petitioner Morvillo, Abramowitz, Grand, Iason & Silberberg, P.C. is a privately-held law firm. The law firm has no corporate parent and no publicly held company owns 10% of more of its stock.

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OPINIONS BELOW

The decision of the Second Circuit is reported at 312 F.3d 70 (2d Cir. 2002) and is reproduced in the appendix to this petition (Pet. App. 1a-22a). The October 23, 2001 and October 29, 2001 decisions of the United States District Court for the Southern District of New York are unpublished and are reproduced in the appendix to this petition (Pet. App. 23a-26a). Because the October 23, 2001 decision of the District Court relied upon reasons given on the record during oral argument, relevant portions of the transcript of the oral argument are also reproduced in the appendix to this petition (Pet. App. 27a-39a).

JURISDICTION

On November 15, 2002, the Second Circuit affirmed the orders of the district court granting summary judgment in favor of the respondents and denying the petitioners' cross-motion for summary judgment. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Freedom of Information Act ("FOIA") provides that agencies of the federal Government need not disclose to the public "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5).

INTRODUCTION

Title 5 U.S.C. § 552(b)(5) ("Exemption 5") exempts from the FOIA's disclosure requirements "inter-agency or intra-agency memorandums or letters which would not be available

by law to a party other than an agency in litigation with the agency." Despite the plain language of Exemption 5, which applies only to "inter-agency or intra-agency memorandums or letters," and this Court's repeated admonition that the limited exemptions to the FOIA's mandate of disclosure be narrowly construed, some federal courts of appeal, including the Second Circuit in this case, have expanded the terms of Exemption 5 on dubious policy grounds to protect from disclosure memoranda written by, or directed to, persons or entities belonging to no Government agency. *See Department of the Interior v. Klamath Water Users Protective Assoc.*, 532 U.S. 1, 9 (2001) (citing decisions from the Second, Fifth and D.C. Circuits).

As this Court recently noted, those federal courts that have adopted this expansive understanding of Exemption 5 typically "have held that the exemption extends to communications between Government agencies and outside consultants hired by them," characterizing such communications as "intra-agency" memoranda or letters protected from the FOIA's disclosure requirements by the deliberative process privilege. *See id.* at 10. This Court referred to this interpretation of the FOIA as the "consultant corollary to Exemption 5." *Id.* at 11. To date, this Court has not addressed the issue of whether, under *any* circumstance, a consultant's report may be withheld from disclosure under Exemption 5. *Id.* at 12.

Although this Court has never ruled on the validity of the consultant corollary, which is a legal fiction, the functional approach to Exemption 5 embodied by the corollary is contrary to this Court's numerous decisions holding that the exemptions to the FOIA must be construed narrowly in accordance with the

statute's basic policy of disclosure. *See, e.g., Klamath*, 532 U.S. at 8 (FOIA's exemptions "have been consistently given a narrow compass"); *FBI v. Abramson*, 456 U.S. 615, 630 (1982) ("FOIA exemptions are to be narrowly construed"). Because the FOIA is to be construed broadly in favor of disclosure while its exemptions are to be construed narrowly, it is improper to expand the bounds of Exemption 5 without a basis in the Statute's text or its legislative history. *See Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990). This Court has recognized that "the most natural meaning of the phrase 'intra-agency memorandum' is a memorandum that is addressed both to and from employees of a single agency." *Klamath*, 532 U.S. at 9 (quoting *Department of Justice v. Julian*, 486 U.S. 1, 19 n.1 (1988) (Scalia, J., in dissent)). Similarly, the most natural meaning of the phrase "inter-agency memorandum" is a memorandum addressed between employees of different agencies, a definition which would not apply to the document sought by petitioners.

In this case, relying on the consultant corollary, the Second Circuit held that the document sought by petitioners is protected from disclosure as an "inter-agency" memorandum because the document was transmitted from one Government agency to a "consultant" retained by a separate agency. Petitioners seek to have this Court interpret Exemption 5 narrowly, in accordance with this Court's prior decisions, giving the phrase "inter-agency or intra-agency memorandums" its most natural reading, and preventing further application of the consultant corollary by the courts. In so doing, this Court will lead a number of federal circuits out of error and will clarify the bounds of one of the most frequently relied upon and abused exemptions to the FOIA's disclosure requirements.

STATEMENT

During his public confirmation hearings, then Internal Revenue Commissioner Charles Rossotti promised the United States Senate that he would "reform and improve" the Internal Revenue Service ("IRS"). To that end, Commissioner Rossotti requested that Judge William H. Webster, the former director of the FBI and CIA, direct an "independent review" of the IRS' Criminal Investigation Division ("CID"). Pet. App. 4a.

In response to Commissioner Rossotti's request, Judge Webster assembled a high-profile independent task force, the "Webster Commission," which was neither a Government agency nor a subdivision thereof. Pet. App. 4a, 11a. Petitioners maintained before the Second Circuit that unlike the situation involving a typical agency consultant, the creation and purpose of the Webster Commission was a matter of national news and the "Commission essentially functioned as a watchdog, providing some measure of public oversight over the IRS." Pet. App. 3a, 16a n.4.

After the Webster Commission completed its nine-month review of the CID, it submitted its findings to Commissioner Rossotti in the form of a report (the "Webster Report") which was promptly released to widespread media attention. Pet. App. 5a. The Webster Report discusses in two places a memorandum (the "Memorandum") drafted by Shirah Neiman, Esq., then Deputy United States Attorney for the Southern District of New York, for the benefit of the Webster Commission. Pet. App. 4a-6a.

While reading the Webster Report, petitioner Tigue noticed its discussion of the Memorandum. Mr. Tigue is an attorney whose law firm often represents individuals and entities in connection with tax issues. On August 18, 1999, Mr. Tigue and his law firm made a request under the FOIA to the IRS for a copy of the Memorandum. Pet. App. 6a. Their request was denied by the Department of Justice on April 28, 2000. On September 28, 2000, the Department of Justice denied petitioners' appeal of that decision. Pet. App. 6a.

On February 14, 2001, petitioners filed suit in the United States District Court for the Southern District of New York. The parties each filed motions for summary judgment. On October 23, 2001, the District Court granted defendants' motion for summary judgment in part and denied plaintiffs' motion for summary judgment in part, holding that the Memorandum was an "intra-agency" memorandum exempt from production pursuant to the deliberative process privilege under 5 U.S.C. § 552(b)(5), while reserving the issue of whether the factual portions of the Memorandum could be produced in redacted form. Pet. App. 6a-7a, 16a n.5, 25a-26a. On October 29, 2001, after reviewing the Memorandum *in camera*, the District Court held that all the factual material in the Memorandum was "inextricably intertwined with evaluations and recommendations of policy," and it need not be produced in redacted form. Pet. App. 7a, 23a-24a.

On November 15, 2002, the United States Court of Appeals for the Second Circuit affirmed the rulings of the District Court, holding that the Memorandum was protected by the deliberative process privilege incorporated in Exemption 5. Pet. App. 1a-22a. However, contrary to the District Court's

determination that the Memorandum is an intra-agency IRS document, the Second Circuit concluded that the Memorandum was an inter-agency document. Pet. App. 12a, 16a. The Second Circuit concluded that the Memorandum was "inter-agency" even after that Court framed the "question at issue regarding the intra- or inter-agency requirement [as] whether the document either originated from or was provided to an entity that is not a federal Government agency, in which case the document is not protected by the exemption," and noted that it is "undisputed that the Webster Commission was not an 'agency.'" Pet. App. 11a.

The Second Circuit reasoned that because it had held in a previous decision (which petitioners had argued was incorrectly decided) that "communications with consultants may be considered intra-agency," the narrower issue was whether the Webster Commission "may be considered a part of the IRS for purposes of determining whether the Neiman Memorandum falls within the scope of Exemption 5 as an inter-agency communication." Pet. App. 12a-14a. The Second Circuit answered this question affirmatively, holding "that because the Webster Commission was acting as a consultant to the IRS when it solicited the Neiman Memorandum, and the Neiman Memorandum was prepared by the Southern District, an agency, to assist the IRS with determining how best to reform the CID, the Neiman Memorandum is an inter-agency communication." Pet. App. 11a-12a. In short, the Second Circuit was able to hold that the Memorandum was exempt from production only by relying on the legal fiction that the

Webster Commission, which was indisputably not part of any federal agency, should be considered a part of the IRS.[1]

REASONS FOR GRANTING THE WRIT

This petition satisfies a number of the traditional hallmarks for obtaining review. The issue for which petitioners seek review has not previously been settled by this Court, although it has been the subject of significant analysis in recent Court *dicta* and in a prior dissenting opinion. *See Klamath*, 532 U.S. at 7-12; *Julian*, 486 at 19. n.1 (dissent). Furthermore, a number of federal courts of appeal have erroneously expanded the bounds of Exemption 5 to the FOIA in a manner inconsistent with the reasoning in many prior decisions of this Court. Moreover, the issue is important because the misguided application of the consultant corollary continues to result in the denial of numerous meritorious FOIA requests each year and unwarranted litigation. This Court should grant review in order to provide clear guidance to the federal judiciary regarding the scope of Exemption 5 and to permit the public to have the access to records intended by the FOIA.

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1. The Second Circuit also held that the Memorandum was a "pre-decisional" privileged document, that the privilege was not waived, and that no purely factual matter in the Memorandum was reasonably segregable from the exempt portions of the Memorandum. *Id.* at 80-82.

I. The Second Circuit Improperly Ignored The Plain Language Of The Freedom of Information Act And This Court's Prior Rulings In Holding That The Memorandum Is An "Inter-Agency" Memorandum Shielded From Disclosure By Exemption 5.

The FOIA requires that agency records be disclosed unless the document sought falls within one of the expressly enumerated exemptions. *See* 5 U.S.C. § 552, 552(b)(5). In this case, the Government claims authority to withhold the Memorandum under Exemption 5, which provides that the FOIA does not apply to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The Government must carry the burden of proof with respect to its claim. 5 U.S.C. § 552(a)(4)(B).

The Government's burden of proving the applicability of an exemption to the FOIA is not intended to be easy. The FOIA was enacted to promote a "general philosophy of full agency disclosure" in an effort to encourage "open and honest government." *Grand Central Partnership, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999). The Statute "seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *EPA v. Mink*, 410 U.S. 73, 80 (1973). As such, the Act's "basic purpose . . . is to ensure an informed citizenry." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Thus, "disclosure, not secrecy is the dominant objective of the Act." *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976). To these ends, it is well established that the FOIA must

be broadly construed in favor of disclosure and that all exemptions from disclosure set forth in the FOIA must be narrowly construed. *Klamath*, 532 U.S. at 8 (citing *United States Dept. of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989) and *FBI v. Abramson*, 456 U.S. 615, 630 (1982)).

By its terms, Exemption 5 applies only to inter- or intra-agency memoranda and letters. 5 U.S.C. § 552(b)(5). Exemption 5 also incorporates all civil discovery privileges, including the deliberative process privilege, a subset of the executive privilege. The deliberative process privilege is based on the premise that agency officials will not communicate candidly amongst themselves if their remarks are potentially discoverable. *Klamath*, 532 U.S. at 10. The privilege is intended to enhance the quality of agency deliberations. However, because Exemption 5 may be applied only to "inter-agency or intra-agency memorandums or letters," where this "threshold condition" is not met, the issue of privilege need not be reached. *See id.* at 9, 12 n.3.

In March 2001, after noting that all its prior decisions discussing Exemption 5 concerned the Exemption's "second condition" – that the agency need not disclose documents that would not be discoverable in civil litigation – this Court cautioned that "the first condition of Exemption 5 is no less important than the second: the communication must be 'inter-agency or intra-agency.'" *Id.* at 9. The Court emphasized that there is "no textual justification for draining the first condition of independent vitality . . . ." *Id.* at 12.

In this case, the Second Circuit's decision was made in contravention of the plain language of the statute, this Court's

exhortations that Exemption 5's inter- or intra-agency requirement be taken seriously, and the undisputed facts. The Second Circuit expressly recognized that it is "undisputed that the Webster Commission," the recipient of the Memorandum, "was not an 'agency.'" Pet. App. 11a. Consequently, the Memorandum should not be considered an inter- or intra-agency memorandum subject to Exemption 5.

The Second Circuit's erroneous decision in this case was a direct result of its reliance on wrongly decided Second Circuit precedent. *See* Pet. App. 12a-16a (citing *Lead Industries Ass'n, Inc. v. OSHA*, 610 F.2d 70, 83 (2d Cir. 1979)). In the 1979 *Lead Industries* case, the Second Circuit adopted the consultant corollary and its underlying rationale, as it first appeared in a footnote to a decision authored by the D.C. Circuit in 1971 precisely as it was expressed in that case. *See Lead Industries*, 610 F.2d at 83 ("we have nothing that can usefully be added to Chief Judge Bazelon's statement in *Soucie*") (discussing *Soucie v. David*, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971)). In *Soucie*, the D.C. Circuit held:

> Government may have a special need for the opinions and recommendations of temporary consultants, and those individuals should be able to freely give their judgments without fear of publicity. A document like the Garwin Report should therefore be treated as an intra-agency memorandum of the agency which solicited it.

Soucie, 448 F.2d at 1078 n.44.

The Second Circuit reached a decision contrary to law by adopting the consultant corollary. This Court has noted that

the terms of Exemption 5 do not extend to outside consultants. *See Klamath*, 532 U.S. at 9 ("neither the terms of the exemption nor the statutory definitions say anything about communications with outsiders"). Although a dissenting opinion of this Court stated that it is "textually possible" to read the phrase "intra-agency" to include memoranda received from outside sources under certain circumstances, petitioners submit that this is possible only by adopting the legal fiction that an outside source may be deemed part of the agency in question. *See Julian*, 486 U.S. at 19 n.1 (Scalia, J., in dissent). In fact, the same dissenting opinion noted that "the most natural meaning of the phrase 'intra-agency memorandum' is a memorandum that is addressed both to and from employees of a single agency." *Id.* A majority of this Court recently noted the divergence of these two views. *Klamath*, 532 U.S. at 10 (characterizing the more expansive interpretation as "the latter view").

This Court has repeatedly instructed that statutes are normally to be interpreted in accordance with the ordinary meaning of its terms. *See, e.g., Williams v. Taylor*, 529 U.S. 420, 431 (2000) (starting with "the language of the statute," whose words are given their "'ordinary, contemporary common meaning,' absent an indication Congress intended them to bear some different import") (quotation omitted); *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (in the absence of an express definition, a statutory term shall be construed in accordance with its "ordinary or natural meaning"); *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990) ("The starting point for interpretation of a statute 'is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'"). Given that the FOIA must be

construed broadly in favor of disclosure while its exemptions must be construed narrowly, adherence to the natural meaning of the terms of the exemptions is of paramount importance.

Where, as here, the plain language of a statute is unambiguous, there is no need to consider legislative history. *See Toibb v. Radloff*, 501 U.S. 157, 164 (1991) (legislative history "makes no difference" where "the plain language of the statute" is clear); *Garcia v. United States*, 469 U.S. 70, 75 (1984) ("When we find the terms of a statute unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances'"). This notwithstanding, the FOIA's legislative history does not reveal a Congressional intention to read the language of Exemption 5 expansively. To the contrary, this Court has concluded that Congress "expressly intended 'to delimit the exception (5) as narrowly as consistent with efficient Government operation.'" *Mink*, 410 U.S. at 89 (citing S. Rep. No. 813, 89th Cong., 1st Sess. 3, 9 (1965) and H.R. Rep. No. 1497, 89th Cong. 2d Sess., at 10 (1966)). Beyond the unsupported policy considerations of certain members of the federal judiciary, there is no evidence to suggest that disclosing to the public consultants' reports (or memoranda submitted to consultants) will impinge efficient Government operation.

In addition, the policy considerations which led Judge Bazelon to create the consultant corollary, the same policy considerations underlying the deliberative process privilege, are by no means compelling. In no event should they lead a court to disregard the ordinary meaning of the terms of Exemption 5. In fact, noted commentators have concluded that the deliberative process privilege "rests on . . . a puny instrumental rationale." Charles A. Wright & Kenneth W. Graham, *Federal*

Practice & Procedure: Evidence § 5680 (2001). According to Wright and Graham:

> The purpose of the deliberative process privilege, we are told, is to "encourage free exchange of ideas during the process of deliberation and policy making" and thus to "prevent injury to the quality of agency decisions." It rests upon two dubious empirical assumptions. The first is that government bureaucrats "will not feel free to express their opinions fully and candidly when they fear that their views will be made public." The second is that "effective and efficient governmental decision making depends on the free and uninhibited flow of ideas." However, . . . the enthusiasts for the privilege never trouble to explain how a bureaucrat who does not think his civil service status is enough protection against public criticisms of his ideas will be encouraged to speak out by a privilege that is under the control of the political head of the agency who will be only too happy to waive the privilege when it serves his need to scapegoat his underlings for bad advice and thus avoid political responsibility for bad agency decisions. Moreover, as one astute student writer has pointed out, the candor rationale would be adequately served by a privilege that protected the name of the idiot but not the nature of the idiocy.

Id. (citations omitted).

This instrumental rationale makes even less sense when applied to independent consultants, who, unlike the Webster Commission, typically are paid for their efforts and their opinions and typically are controlled by the agency which hired them. To the extent a consultant believes having his opinions

available to the public will make it less desirable to offer his opinions, this can be factored into the price at which he offers his services to the Government. The instrumental rationale makes no sense whatever when applied to the Webster Commission itself, given the Commission's public profile and independent purpose. This case demonstrates that the Government will use the label "consultant" as widely as is necessary when it wishes to keep certain documents hidden from public view. *Cf. Klamath*, 532 U.S. at 12 ("The Department [of the Interior] seems to be saying that 'intra-agency' is a purely conclusory term, just a label to be placed on any document the Government would find it valuable to keep confidential.").

It should be left to Congress, not judges, to amend the FOIA if it believes that consultants not employed by any agency deserve the same protection from scrutiny that has been extended to agency employees. To date, Congress has shown no reluctance to amend the FOIA since its passage in 1966, having done so in 1967, 1974, 1976, 1978, 1984, 1986, 1996, and 2002. Because documents given to, or received from, outside consultants are not protected from disclosure under Exemption 5, this petition should be granted.

II. The Question Presented is Important and Recurring.

On average, the Federal Government receives *600,000* FOIA requests each year. David Boling, *Access to Government-Held Information in Japan: Citizens 'Right to Know' Bows to the Bureaucracy*, 34 Stan. J. Int'l. L. 1, 6 n.28 (1998). Furthermore, a Congressional study revealed that during the four years after the FOIA was established,

Exemption 5 was relied upon by the Government as the second most common ground for refusing to disclose information. *Freedom of Information Amendments Sourcebook, House Government Operations Committee and Senate Judiciary Committee*, 94th Cong., 1st Sess., at 104-05 (1975). In addition, it is generally accepted that federal agencies often enlist the opinions and advice of temporary consultants, particularly when addressing issues outside their normal area of expertise. *See, e.g., CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1162 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 977 (1988); *Hoover v. United States Department of the Interior*, 611 F.2d 1132 (5th Cir. 1980); *Lead Industries*, 610 F.2d at 83; *Wu v. National Endowment for the Humanities*, 460 F.2d 1030 (5th Cir. 1972), *cert. denied*, 410 U.S. 926 (1973); *Soucie*, 448 F.3d at 1078 n.44. In short, the Government makes a general practice of relying on non-governmental personnel in the creation of policies effecting the public without having to disclose to the public the nature of the outside advice or information it receives or the Government's reliance on this advice or information.

The question as to the reach of Exemption 5 is also important due to the apparent willingness of the Government and the federal courts to interpret Exemption 5 in an increasingly elastic manner. Shortly after the FOIA was enacted, Exemption 5 was recognized as potentially the broadest exemption to the Statute's disclosure requirements. *See* Note, *The Freedom of Information Act and the Exception for Intra-Agency Memoranda*, 86 Harv. L. Rev. 1047, 1048 (1973); *cf.* Wright & Graham, *supra*, § 5680 ("The prediction that Exemption 5 was potentially the 'most far reaching' of the FOIA exemptions has proven to be true in practice."). Courts quickly noticed "the 'inevitable temptation of a governmental

litigant to give [Exemption 5] an expansive interpretation in relation to the particular records at issue.'" *Soucie*, 448 F.2d at 1078 (quotation omitted). Since then, Exemption 5 has been applied "to an increasingly broader range of agency communications," including "budget requests, pre-sentence reports to federal judges, summaries of the testimony of witnesses at a public hearing, I.R.S. secret policies and efforts to cover-up political interventions by members of Congress in the problems of individual taxpayers, and routine applications of agency policy." Wright & Graham, *supra*, § 5680.

The question as to the reach of Exemption 5's consultant corollary is often before the federal courts. *See, e.g.*, *Klamath*, 532 U.S. at 7-12; *Julian*, 486 U.S. at 19 n.1 (dissent); *Tigue v. Department of Justice*, 312 F.3d 70 (2d Cir. 2002); *Cuomo*, 166 F.3d 473; *Public Citizen, Inc. v. Department of Justice*, 111 F.3d 168 (D. C. Cir. 1997); *Formaldehyde Institute v. Department of Health & Human Servs.*, 889 F.2d 1118 (D.C. Cir. 1989); *CNA*, 870 F.2d 1132; *Hoover*, 611 F.2d 1132; *Lead Industries*, 610 F.2d 70; *Soucie*, 448 F.2d 1067. However, despite the substantial litigation regarding the reach of Exemption 5, there is no unanimity of opinion regarding how the consultant corollary should be applied. For example, in characterizing the D.C. Circuit's view of Exemption 5, the Ninth Circuit recently stated that it "has not yet had occasion to address the reach of the inter-agency/intra-agency test under Exemption 5 and to determine whether the expansive interpretation adopted by the District of Columbia is consistent with the policy of broad disclosure on which the FOIA is anchored." *Klamath*, 189 F.3d at 1038 (discussing *Public Citizen*, 111 F.3d 168, *Formaldehyde*, 889 F.2d 1118, and *Ryan v. Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980)).

Widespread confusion over important and recurring questions, conflict with prior Supreme Court precedent, and disharmony with the plain language of federal statutes, even in the absence of a true circuit court split, are factors which militate strongly in favor of granting ceritorari. Stephen M. Shapiro, "*Ceritorari Practice: The Supreme Court's Shrinking Docket*," 24 No. 3 Litigation 25, 29 (1998). This case provides an excellent opportunity for this Court to delineate certain boundaries for an increasingly expansive exemption from the FOIA's disclosure requirements and to make additional litigation over the availability of consultants' reports unnecessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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